

Webco Bodies, Inc. d/b/a Webco Pacific, Inc. and Leroy Simmons

Webco Bodies Inc. and Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Cases 14-CA-9990 and 14 RC 8371

August 25, 1978

DECISION, ORDER, AND DIRECTION

On September 14, 1977, Administrative Law Judge Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, Respondent Employer filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, recommendations,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

Contrary to our dissenting colleagues, we find that the evidence supports the Administrative Law Judge's finding that the seven employees were discriminatorily discharged. During the week before the layoffs, the employees engaged in intensive union organizing both inside and outside the plant. Of the 18 unit employees, 9 signed authorization cards on February 2 or 3, 1977. That Respondent knew of the organizing activities at the time of the layoff is supported by the small plant doctrine. *Wiese Plow Weld-*

ing Co., Inc., 123 NLRB 616 (1959), and also by the fact that the brother-in-law of the plant manager was involved in the union organizing and card signing prior to the layoffs. The special treatment accorded the brother-in-law regarding his seniority rights and avoidance of the layoff indicates his special status.²

On February 3, 1977, seven employees were permanently laid off. Six of the seven employees had signed authorization cards. While there was economic justification for the reduction in force, we agree with the Administrative Law Judge that the seven employees were terminated, rather than being laid off temporarily, because they had engaged in union activity. Although Respondent had a similar reduction in force for economic reasons in 1975, a substantial number of the employees were only temporarily laid off, rather than being permanently discharged at that time. Respondent does not explain adequately why, in 1977, it chose to discharge all seven employees. At the hearing, Vice President Chott admitted that, from a business standpoint, it is very possible that there could have been, or should have been, a temporary layoff. Chott attempted to explain his actions by admitting first that he did not know, from the information available at the time of the layoff, whether or not the normal volume of business would resume, and then stating that it would be more "honest" to tell employees that they were fired, since he could not promise them their jobs back within a specific period of time. We are not impressed with this explanation. Unless the contraction were expected to be permanent, the termination itself, absent adequate explanation, is suspect since the normal expectation is that Respondent would prefer to rehire tried and capable employees. Cf. *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

Furthermore, contrary to intimations in the dissent, there is no evidence in the record that, at the time of the 1975 layoffs, Respondent had some grounds for anticipating an upswing in business that would, within a reasonable period of time, require the recall of at least some employees. Still, in 1975 Respondent temporarily laid off certain employees

¹ Respondent excepted to the recommendation of the Administrative Law Judge that the challenge to the ballot of Edwin Chott III be sustained. Chairman Fanning and, as indicated in their separate opinion at fn. 7, Members Penello and Murphy find merit in this exception and will direct that the ballot be opened and counted. While the Administrative Law Judge concluded that the one-sixth share of the corporation owned by the challenged voter's father, Edwin Chott II, was "substantial" and that Chott III was, therefore, excluded as being "an individual employed by his parent" under Sec. 2(3) of the Act (and therefore without employee status), they find such a conclusion, and the resulting exclusion, unwarranted. Inasmuch as Edwin Chott II owned less than a 50-percent interest in Respondent's corporation, his son retains his employee status as defined in Sec. 2(3) of the Act. *Cerni Motor Sales*, 201 NLRB 918 (1973). Furthermore, Edwin Chott III enjoys no special privileges or status because of his family relationship; he is 27 years old and does not live with his father. Therefore, Edwin Chott III shares a community of interest with the unit employees, is included in the unit, and is eligible to vote.

For the reasons set forth in the dissenting opinion in *Toyota Midtown, Inc.*, 233 NLRB 797 (1977), Members Jenkins and Truesdale do not find any merit in Respondent's exception to the recommendation of the Administrative Law Judge that the ballot of Edwin Chott III be sustained.

Members Jenkins and Truesdale also adopt the Administrative Law Judge's recommendation that the challenge to the ballot of Donald Neiger be overruled *pro forma*, in the absence of exceptions.

² The brother-in-law left his employment with Respondent for 2 to 4 weeks and apparently attempted to start up his own business during this period. Assuming that he legitimately avoided layoff because Respondent counted this break in actual employment as a leave of absence and not as a break in service for seniority purposes, we still find evidence of special treatment. It strains credulity to assume that other employees could reasonably expect to be granted leaves of absence for extended periods of time to start up businesses of their own with the option of returning with no loss of seniority. We agree with the Administrative Law Judge that "[t]aking care of your brother-in-law is not a motive proscribed by the Act . . ." but we do find such conduct evidence of special status.

rather than discharging them. The relevant fact in 1975 and in 1977, is of course, Respondent's expectations and motives at the time of the layoffs rather than the economic realities that unfolded during the following months.

Respondent's failure to offer a believable explanation for its actions, under the circumstances, requires a finding of a discriminatory discharge. The wording of the layoff notice underscores Respondent's intent to preclude the terminated employees from voting in the anticipated election and to undermine the Union's strength at the polls. For these reasons, we agree with the Administrative Law Judge that the employees were discharged because of their union activities.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Webco Bodies, Inc., d/b/a Webco Pacific, Inc., Pacific, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DIRECTION

It is hereby directed that Case 14-RC-8371 be severed and remanded to the Regional Director for Region 14 and that the Regional Director shall, pursuant to the Rules and Regulations of the Board, within 10 days from the date of this Decision, Order, and Direction, at a time and place he shall announce, open and count the ballots of Ernie Detherage, Bryan Disharoon, David Heitkamp, Clinton Manasco, Robert Mayfield, Leroy Simmons, Garry Stanfill, Edwin Chott III, and Donald Neiger and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of the challenged ballots and the appropriate certification.

MEMBERS PENELLO and MURPHY, dissenting in part:

We do not agree with the majority's unwarranted conclusion that the layoff of the seven employees was discriminatory. Such a finding is speculative and unsupported by the evidence; it is a compounding of inferences based on unfounded assumptions. The record fully supports and the majority concedes that Respondent was having economic difficulties. Moreover, there is absolute proof that at the time the employees were terminated there was insufficient work for them. Similarly, it is beyond dispute that Respon-

dent was suffering from a cash shortage requiring "economic adjustments if the payroll was to be met." There is no doubt that the layoffs were undertaken for valid economic reasons with no discriminatory motive.

Furthermore, the layoffs were based on seniority.³ The seven employees selected for layoff had the least seniority. Consequently, the record fully establishes that neither the layoffs nor the selection of employees had any other genesis than sound business considerations and normal personnel practices. There is no evidence whatsoever of independent violations of Section 8(a)(1) of the Act nor of any other indicia of union animus. As the events unfolded there was no reason to question the motives for Respondent's action. Respondent did only what any prudent businessman would have done when confronted with the work shortage and the acute cash-flow problem: it reduced the work force.

The majority, however, insists on conjuring up chimeras and specters of evil motives, searching for clues to unlawful actions where there are none, building inferences upon mere speculation. There is no evidence that Respondent was aware of the union activities of any particular employees that would enable Respondent to single out such employees for discharge. A flurry of union activity in the face of declining volume of business does not cause the resulting reduction in force to be discriminatory.

The majority insists that the layoffs were unlawful because the seven employees should have been only temporarily, not permanently, laid off. In reaching this result the majority relies, in part, on the Respondent's wording of the layoff notice which, the majority infers, was clearly intended to preclude the laid-off employees from voting in the anticipated election.⁴ It is difficult to say much about such reasoning except it is specious and transparently erroneous. From the fact that Respondent sought to make clear that it intended a discharge of the seven employees, they seek to infer the alleged further fact that the employees should have been only temporarily laid off—a *non sequitur* if ever there was one. Such an inference would be justified, if at all, only if there were some

³ We disagree with the majority's conclusion that James Kile, a brother-in-law of Kenneth Grissom, Respondent's vice president, was accorded special treatment with respect to his seniority rights and his avoidance of layoff. The record indicates that Kile took a 2-week leave of absence which Respondent did not treat as a break in service. There is no evidence that Respondent departed from past practice in allowing Kile to retain his seniority after the leave of absence. When employee Simmons questioned Kile's seniority after the layoff, Grissom offered documents to clarify the situation. Simmons did not pursue the matter.

⁴ At the time of the discharge, no representation petition had been filed.

other evidence showing that discharges were unwarranted in the circumstances. Here, however, all the evidence goes the other way and proves, as indicated above, that there were substantial economic reasons for discharging the employees. With regard to this difficulty in the majority's position, the best it can do to support this position is to adverb to the fact that in 1975—when there was a economic reduction in force—not all the employees were discharged: some—apparently, a substantial number—were only temporarily laid off. But that hardly demonstrates that any or all of the seven individuals discharged in 1977 should have been temporarily laid off. One can scarcely discern any pattern or practice with regard to layoffs on the basis of the 1975 reduction in force alone. The majority makes a further attempt to justify its finding by seizing on the testimony of Respondent Vice President Chott that it was “possible” that there could have been” a temporary layoff in 1977. We are not impressed by the majority's reliance on speculative alternatives elicited on cross-examination. Furthermore, we decline to substitute our own “business judgment” for that exercised by Respondent in the face of an immediate economic crisis. It is not our function to review the day-to-day personnel decisions of an employer from the comfortable position of the Monday-morning quarterback where there is no tangible evidence of unlawful activity. Whether or not an alternative course of action could have been chosen is irrelevant.

Again, what is needed to support a finding of violation is, at a minimum, some evidence, independent of the layoffs themselves, to the effect that, when Respondent made its decision to discharge the seven in 1977, some grounds existed for anticipating an upswing in business that would, in a reasonable period of time, require recalling at least some of them or require the hiring of their replacements.⁵ But, to reiterate, there is no such evidence, and also no evidence that any of the laid-off employees were in fact rehired or replaced by new employees at any time material herein. Absent any such showing, the conclusion that the layoffs violated Section 8(a)(3) and (1) is without any evidentiary basis, is thus wholly speculative, and is therefore unwarranted.⁶

In view of the above undisputed facts, we find that the seven employees were on February 3, 1977, properly discharged for lawful economic reasons. We therefore further find that they were not employees

of the Respondent when the representation election was held on March 23, 1977, and we would, thus, sustain the challenges to their ballots.⁷

DECISION

STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Administrative Law Judge: The charge in Case 14-CA-9990 was filed on February 4, 1977. The complaint was issued on March 4.

The petition in Case 14-RC-8371 was filed on February 8, 1977. A Stipulation for Certification Upon Consent Election was approved by the Regional Director on February 28. An election was held in a production and maintenance unit on March 23. There were five votes for Local 618 and four against. Eight challenged ballots are determinative.

On March 25, 1977, the Regional Director, noting in his Report on Challenged Ballots in Case 14-RC-8371 that six of the eight had been cast by persons named as discriminatees in Case 14-CA-9990, consolidated the cases for hearing. It was held in St. Louis, Missouri, on April 14. The principal issue litigated was Respondent's motive for discharging its seven least senior employees on February 3, 1977. For the reasons set forth below, I find it was one proscribed by Section 8(a)(3) of the National Labor Relations Act, as amended.

Upon the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after due consideration of briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Missouri corporation, is engaged at Pacific, Missouri, in the manufacture of aluminum truck bodies. During calendar 1976 it sold products valued in excess of \$50,000 to enterprises in the State of Missouri each of which shipped products valued in excess of \$50,000 directly to customers located outside the State of Missouri.

II. THE UNFAIR LABOR PRACTICE

A. Facts

In January and February 1975, Respondent discharged 10 employees and temporarily laid off 7.¹ It did not reduce its work force in the winter of 1976.

Respondent builds aluminum truck bodies which are eventually attached to chassis belonging to its customers. Some bodies are shipped in a knocked-down condition,

⁵ See *Vanella Buick Opel, Inc.*, 191 NLRB 805, 806-807 (1971).

⁶ See *Port-A-Crib, Inc. and Graf-Tlapek, Inc.*, 143 NLRB 483 (1963).

⁷ We agree for the reasons set forth in fn. 1 that Edwin Chott III was an eligible voter and we join in directing that his ballot be opened and counted.

¹ I decline to reverse my ruling that evidence proffered by the General Counsel relating to Respondent's motive in the winter of 1975 is inadmissible because it is too remote from the terminations alleged in the complaint.

referred to in the record as kits. A few are shipped on trailers in a completed state and attached to chassis elsewhere. The rest are mounted on chassis at Respondent's plant.

Respondent markets its product through distributors. When a distributor makes a sale, it notifies Respondent. Respondent generally begins constructing the bodies involved before the chassis arrive at its plant. It attempts to schedule production in such a way that the body will not be ready too long, if at all, before the chassis for which it is being built arrives, although on occasion bodies are finished too soon. A major reason for scheduling production this way is Respondent's concern that it not get too much of its cash tied up. It does not bill its customers until delivery. This work, referred to in the record as Respondent's commercial work, comprises approximately 85 percent of its business.

The other 15 percent, referred to in the record as Respondent's Nabisco work, involves building truck bodies for National Biscuit Company. Respondent acquired its first Nabisco contract in December 1972. The distributor which places these contracts with Respondent is McCabe-Powers Auto Body Company, located in New Jersey. Respondent's contact with McCabe-Powers is Don Borlinghaus, sales representative for McCabe-Powers' commercial division. Nabisco contracts are for relatively large numbers of bodies of the same type to be attached to identical chassis. Respondent schedules its Nabisco work differently from its commercial work. It does not begin building a body until it receives from Nabisco a document known as an assignment sheet which tells it that Nabisco is ready for a particular truck and that the chassis of that truck has arrived at the plant.

Since January 1975, Respondent's complement of rank-and-file employees has fluctuated as follows:

<u>1975</u>		Nov. 12	Aug. 15
Jan. 24		Dec. 12	Sept. 16
Feb. 8			Oct. 18
Mar. 6	<u>1976</u>		Nov. 13
Apr. 10	Jan. 11		Dec. 18
May 11	Feb. 11	<u>1977</u>	
June 12	Mar. 12		Jan. 18
July 12	Apr. 14		Feb. 11
Aug. 12	May 12		Mar. 10
Sept. 12	June 14		
Oct. 12	July 13		

The growth in the second half of 1976 is attributable principally to Respondent's efforts to complete its out-

standing Nabisco contracts. Commercial business was also good during this period. Respondent's normal workweek is 10-hour days, Tuesday through Friday. In August 1976, it went to a 48-hour week by adding an 8-hour shift on Monday. In October 1976, it went to a 56-hour week by adding an 8-hour shift on Saturday. It returned to a 4-day, 40-hour workweek as of the beginning of January 1977. Hours above 40 per week are overtime. Total overtime hours since January 1975 have fluctuated as follows:

<u>1975</u>		Nov. 134	Aug. 366
Jan. 0		Dec. 53	Sept. 138
Feb. 0			Oct. 688
Mar. 0	<u>1976</u>		Nov. 555
Apr. 0	Jan. 0		Dec. 598
May 0	Feb. 0	<u>1977</u>	
June 43	Mar. 0		Jan. 0
July 64	Apr. 0		Feb. 0
Aug. 75	May 186		Mar. 0
Sept. 0	June 201		
Oct. 290	July 235		

Respondent delivered the last body called for in its pre-1977 Nabisco contracts on December 31, 1976. In the meantime, Respondent gave McCabe-Powers its quotations in October on three Nabisco contracts ultimately received in January 1977. Borlinghaus informed Respondent in mid-December that it would get the contracts. Respondent received three Nabisco contracts dated January 3, 1977, on January 4. They totaled 120 units. (Fifteen were canceled prior to the hearing. The record is not clear on whether the cancellation occurred before or after February 3.)

Respondent's four owners (they refer to themselves as partners) are V. J. Baerthel, president of the corporation and engineer, Edwin Chott, vice president in charge of sales and purchases, Kenneth Grissom, vice president in charge of production, and Ione Neiger, secretary and treasurer. Because of the high level of work on hand and the expectation of more Nabisco contracts, Grissom made various statements to various employees on various occasions in 1976 and early 1977 to the effect that a layoff was unlikely. When John Taylor was rehired in mid-1976 (he was one of those terminated in early 1975), Grissom told him Respondent had enough work to last the rest of 1976 and almost all of 1977. About a month after Garry Stanfill was hired in August 1976, he asked Grissom if Grissom was going to work him 2 or 3 months and then lay him off. Grissom said Respondent had enough work to keep Stanfill employed for 2 years. When Robert Mayfield was hired in October 1976, Grissom told Mayfield he could work as long as he wanted, the job was there. When Grissom hired

David Heitkamp in November 1976, he told Heitkamp that Respondent was hiring and there were no layoffs in sight.

Respondent pays its employees a production bonus every 4 weeks. (At the times relevant to this proceeding, the bonus was \$1 per body. It was increased on April 1, 1977, to \$1.50.) At a meeting in early December 1976, when bonus checks were distributed, Grissom said the workload was pretty good. At a Christmas party held on December 23, he said there would be no layoffs in the immediate future, things were looking pretty good due to new contracts with Nabisco as well as work for other companies. At a bonus-dispensing meeting on January 5, 1977, Grissom announced there would be no layoffs in the immediate future because Respondent had just received Nabisco contracts for 120 bodies. A day or two later he said Respondent would prebuild bodies, if necessary, rather than have a layoff.

Respondent's prospects dipped drastically in January 1977. New commercial orders dwindled to 20 (2 weeks' work at the most for a work force of 18), from a monthly range in the high 30's to the low 50's in late 1976. Work did not begin on the new Nabisco orders for a number of reasons. Despite Chott's efforts to get information from Borlinghaus, Respondent was unable to get a line on when chassis would begin to arrive. The first assignments Respondent received on Nabisco's 1977 contracts were dated March 30. The first chassis arrived on March 31. Respondent had in stock only enough of a special steel used only in Nabisco bodies to prebuild three of them. It did not prebuild Nabisco bodies. It did not place an order for more of the special steel in anticipation of assignment sheets and chassis. Such an order of a size to be economically feasible would have required Respondent to buy 41,000 pounds of steel. (It had still not been ordered as of the time of the hearing.) Some of Respondent's January production went into kits.

Sometime late in the week preceding February 3, 1977 (apparently on Friday, January 28), a group of Respondent's employees discussed unionization at lunchtime. On Monday, January 31 (a day when the plant was not operating), Garry Stanfill contacted Local 618. The Union sent him blank authorization cards. He found them at home when he returned from work on Tuesday, February 1. He went to the homes of Bryant Disharoon and Robert Mayfield. He and Disharoon solicited employees to sign cards the next day, both in and out of the plant. As a result of their efforts, the following employees signed authorization cards for Local 618 on the following dates:² Bryant Disharoon—2/2/77, David Heitkamp—2/2/77, James Kile—2/2/77, James Loehr—2/2/77, Clifton Manasco—2/2/77, Leroy Simmons—2/2/77, Garry Stanfill—2/2/77, Bill Zerr—2/2/77, Ernie Detherage—2/3/77, and Clifford Smith—2/6/77. Kile is Grissom's brother-in-law. Stanfill subsequently mailed these cards to Local 618.

Also in the week preceding February 3, 1977, Respondent's executives began discussing its economic situation. On the morning of Tuesday, February 1, Chott again telephoned Borlinghaus in New Jersey and was unable to obtain any useful information about when Respondent would begin receiving Nabisco chassis. Thereafter, Chott, Baerthel, Grissom, and Mrs. Neiger met. They discussed the situation. Grissom suggested prebuilding. Mrs. Neiger, who handles the money, gave them the current financial position. She said she would not be able to meet the payroll if something was not done. This was the first Grissom heard about a cash shortage. The executives opted for a layoff. Grissom decided that he could get along with seven fewer men. The executives decided to lay off the seven least senior employees.³

Respondent's direct labor costs from January 1976 through March 1977 were:

<u>1976</u>		Sept.	\$11,672
		Oct.	18,899
Jan.	\$6,472	Nov.	16,895
Feb.	8,026	Dec.	18,977
Mar.	9,361		
Apr.	11,776	<u>1977</u>	
May	10,461	Jan.	\$13,807
June	11,461	Feb.	9,258
July	15,683	Mar.	8,622
Aug.	13,085		

If there had been no layoff on February 3, 1977, the direct labor costs for the last 2 months would have been February—\$11,928 and March—\$13,050.

² I do not credit the testimony of Robert Mayfield that he signed a card on some unspecified date which was lost in the mail after he posted it himself.

³ Respondent numbers its timecards by seniority, one being the senior employee. The 7 highest numbers were 12-18. In the event, Leroy Simmons, card 11, was let go and James Kile, card 13, was retained. Simmons protested to Grissom on February 3. Grissom offered to show Simmons documents

which would prove Kile had the greater seniority. Simmons did not pursue the matter. The dispute grew out of a 2-week break in Kile's service shortly after Simmons and Stanfill were hired when Kile tried to start a business of his own. Even if Grissom did select Simmons out of order, the fact has no significance in this proceeding. Taking care of your brother-in-law is not a motive proscribed by the Act.

Respondent's receipts, disbursements, and bank balance at the end of each month in the period January 1976 through February 1977 were:

<u>1976</u>	<u>Receipts</u>	<u>Disburse-</u> <u>ments</u>	<u>Bank</u> <u>Balance</u>
January	\$ 76,921	\$ 59,287	\$31,877.00
February	46,275	79,677	14,919.00
March	72,844	82,960	- 19.96
April	90,505	89,855	5,453.00
May	66,935	83,265	133.28
June	120,327	101,463	19,051.00
July	68,492	88,600	-1,092.00
August	102,895	107,205	3,218.00
September	110,983	79,230	34,934.00
October	106,725	138,148	4,149.00
November	137,889	135,241	5,795.00
December	178,256	178,619	5,432.00
<u>1977</u>			
January	108,418	92,559	15,290.00
February	49,144	64,040	1,304.00

On Wednesday, February 2, Chott drafted and Mrs. Neiger polished a notice to be given to the seven men to be laid off. At 5:15 p.m. on Thursday, February 3, 15 minutes before quitting time, the employees were assembled. Grissom gave those being laid off copies of the following document:

Notice
Effective 2/3/77 5:30 p.m.

It is with much regret but due to the continuing lack of orders and business conditions in general, the following employees are laid off:

Leroy Simmons
Gary [sic] Stanfill
Ernie Deatherage [sic]
Bryant Disharoon
Robert Mayfield
David Heitkamp
Clinton Manasco

We do not expect conditions to improve in the foreseeable future and it appears that there is no reasonable expectation that the above listed employees will be called back to work.

Your termination checks are attached.

Sincerely,
WEBCO-PACIFIC, INC.
/s/Edwin W. Chott
Edwin W. Chott,
Vice President

Grissom said the reason for the layoff was lack of work, specifically a shortage of chassis. Each of the seven men received three checks, one for the 4-week bonus period just ended, one for the pay week just ended (Respondent's pay week ends on Wednesday, normal payday is Friday), and one for 1-day's pay for February 3.

Respondent hired no one between February 3, 1977, and the hearing. One man, Paul Bradley, quit on March 24, leaving Respondent with a complement of 10 rank-and-file employees as of the hearing. In March Respondent turned out 51 truck bodies.

B. Analysis and Conclusions

The first issue is whether Respondent knew its employees were engaging in union activities when it decided on a layoff. I find it did, relying principally on the small plant doctrine set forth in *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959). Any other conclusion would be absurd in a situation where one of the employees involved, both in the discussions that started the week before the layoff and the card signing the day before, is the brother-in-law of the plant manager.

The second issue is whether, as the General Counsel contends, Respondent's economic defense is a sham. The data on which Respondent relies are uncontroverted. They clearly establish that Respondent did not need 18 employees under the circumstances which existed at the time of the layoff. A reduction in force was a wise business decision to cope with the situation. Only if the record permitted a finding that Respondent had failed to lay off employees in the past when facing analogous economic plights would it support a conclusion that Respondent would not have laid off anyone at this time but for the employees' union activities. There is nothing in the record about the state of Respondent's business either in the winter of 1975, when there was a reduction in force, or in the winter of 1976, when there was not. I find, therefore, that the General Counsel has failed to prove by a preponderance of the evidence on the record as a whole that Respondent's stated reason for reducing its work force by seven employees on February 3, 1977, is a pretext.

The final issue is whether the General Counsel has proved that Respondent's motive for discharging rather than laying off temporarily was a discriminatory one. Here, I think, he has succeeded. What happened to the seven men on February 3 is referred to in the record as a "permanent" layoff. A permanent layoff ends an employment relationship. It cannot be distinguished from a discharge. Therefore, it follows that the seven were discharged, not laid off in the sense in which that phrase is commonly used, when Respondent handed them their notices. The artful wording of that notice clearly shows Respondent's purpose was to preclude their voting, even though in layoff status, in the election which Respondent could reasonably anticipate would result from their current union activities. There is a basis in the record for finding disparate treatment in this respect. Respondent does not always engage in a "permanent" layoff when faced with the necessity of a reduction. In 1975 it did not discharge all the employees it

got rid of; it temporarily laid off a substantial number. I find, therefore, Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ernie Detherage, Bryant Disharoon, David Heitkamp, Clinton Manasco, Robert Mayfield, Leroy Simmons, and Garry Stanfill, rather than laying them off temporarily on February 3, 1977, because its employees were engaging in union activities.

III. THE CHALLENGED BALLOTS

The eight challenged ballots which have been referred to me in Case 14-RC-8371 were cast by Ernie Detherage, Bryant Disharoon, Clinton Manasco, Robert Mayfield, Leroy Simmons, Garry Stanfill, Donald Neiger, and Edwin Chott III. Under the remedy to which the first six are entitled as a result of Respondent's discrimination against them, they have had a reasonable expectation of recall ever since they were discharged. As laid-off employees with such an expectation on March 23, 1977, when the election was held, they were entitled to vote. I recommend that the challenges to their ballots be overruled.

Donald Neiger is Ione Neiger's grandson. Edwin Chott III is Edwin Chott's son. Both were challenged by Local 618 on the grounds that they are related to owners of Respondent. Mrs. Neiger owns one-third of Respondent's outstanding stock, as does V. J. Baerthel. Edwin Chott owns one-sixth, as does Kenneth Grissom.

Chott III went to work for Respondent in March 1972. Chott bought into the corporation in January 1973. (He previously worked for McCabe-Powers Auto Body Company.) Chott III is a leadman. He is 27 years old and a widower. He does not live with his father. Neiger was originally hired in 1974. He was among the employees who were "permanently" laid off in the January 1975 reduction in force. He was rehired in March 1976. At that time, Mrs. Neiger, aware there was an opening, asked Grissom to consider her grandson. Grissom did so. The record does not reveal how old Neiger is or whether he lives with Mrs. Neiger. Neither Chott nor Neiger enjoys any special status or receives any special privileges as a result of his family relationship.

Both Chott's and Mrs. Neiger's share of the ownership of Respondent is substantial. Cf. *Buckeye Village Market, Inc.*, 175 NLRB 271 (1969). Therefore, Edwin Chott III is not eligible for inclusion in the unit because he is an "individual employed by his parent" within the meaning of Section 2(3) of the Act. *Foam Rubber City #2 of Florida, Inc. doing business as Scandia*, 167 NLRB 623 (1967). Mrs. Neiger, on the other hand, is not Donald Neiger's parent, and Neiger does not enjoy a special status which allies his interests to those of management because of his relationship with her. He, therefore, is eligible. *Pargas of Crescent City, Inc.*, 194 NLRB 616 (1971). I recommend that the challenge to the ballot cast by Edwin Chott III on March 23, 1977, be sustained while the challenge to the ballot cast by Donald Neiger be overruled.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Webco Bodies, Inc. d/b/a Webco Pacific, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Ernie Detherage, Bryant Disharoon, David Heitkamp, Clinton Manasco, Robert Mayfield, Leroy Simmons, and Garry Stanfill rather than laying them off temporarily on February 3, 1977, because its employees were engaging in union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In order to effectuate the policies of the Act, it is necessary that Respondent be ordered to cease and desist from the unfair labor practice found, remedy it, and post the usual notice. Since Ernie Detherage, Bryant Disharoon, David Heitkamp, Clinton Manasco, Robert Mayfield, Leroy Simmons, and Garry Stanfill would have been temporarily laid off on February 3, 1977, for nondiscriminatory reasons in any event, it is not necessary that they be offered immediate reinstatement. Rather, I will recommend that they be placed on a preferential hiring list in the order of their seniority and be reinstated to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges before any new employees are hired. If Respondent has hired new employees since the close of the hearing, it shall discharge them in order to make room for Detherage, Disharoon, Heitkamp, Manasco, Mayfield, Simmons, and/or Stanfill, as the case may be. Whether one discriminatee should be offered immediate reinstatement and made whole for wages lost since March 24, 1977, on the ground that a vacancy was created when Paul Bradley quit on that date, can be left to the compliance stage of this proceeding. Backpay, if any, shall be computed on a quarterly basis, plus interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and

⁴ In accordance with our decision in *Florida Steel Corporation*, 231 NLRB 651 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁵

Respondent Webco Bodies, Inc. d/b/a Webco Pacific, Inc., Pacific, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees for engaging in union activities.

(b) In any other manner interfering with or attempting to restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following action necessary to effectuate the purposes of the Act:

(a) Place Ernie Detherage, Bryant Disharoon, David Heitkamp, Clinton Manasco, Robert Mayfield, Leroy Simmons, and Garry Stanfill on a preferential hiring list, reinstate them, and make them whole for any losses suffered as a result of their discharge on February 3, 1977, in the manner detailed in the section above entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its plant in Pacific, Missouri, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁵ In the event that no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁶ In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board having found, after a hearing, that we violated Federal law by discharging employees rather than laying them off temporarily at a time when business conditions required a reduction in force, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other aid or protection
- To refrain from any or all of these things.

WE WILL NOT discharge you for engaging in union activities.

WE WILL NOT in any other manner interfere with or attempt to restrain or coerce you in the exercise of the above rights.

WE have offered Ernie Detherage, Bryant Disharoon, David Heitkamp, Clinton Manasco, Robert Mayfield, Leroy Simmons, and Garry Stanfill reinstatement to their former positions, without prejudice to their seniority or other rights and privileges. WE will make them whole for any losses they suffered, with interest at 7 percent per annum, as a result of their discharge on February 3, 1977.

All our employees are free to join Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, if they choose.

WECO BODIES, INC. d/b/a WECO PACIFIC, INC.